

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

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No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

V.

SIERRA CLUB, INC., ET AL., *Respondents.*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners

V.

SIERRA CLUB, INC., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR AMICI CURIAE

Western Fuels Association, Inc., Basin Electric Power Cooperative,
Inc., Heartland Consumers Power District, Lincoln Electric
System, Missouri Basin Municipal Power Agency, Tri-State
Generation and Transmission Association, Wyoming Municipal
Power Agency and Cajun Electric Power Cooperative, Inc.

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 Generation and Transmission Association, Wyoming Municipal
 Power Agency and Cajun Electric Power Cooperative, Inc.

On January 12, 1976, this Court granted the petitions for writ of certiorari and consolidated these re-

lated cases. This brief is submitted by the above-noted Amici Curiae pursuant to Rule 42(1), (2) of this Court. All parties to this action have consented to the filing of this brief and their consents have been lodged with the Clerk.

DESCRIPTION AND INTEREST OF AMICI CURIAE¹

Western Fuels is a non-profit membership corporation formed under the laws of the State of Wyoming whose purpose is to obtain coal and the fuel supplies required for the generation of electric energy by its members to serve the needs of the end-use consumers of each member. Western Fuels has the responsibility to provide a dependable source of coal to supply the needs of the Laramie River Station, a coal-fired generating facility to be located near Wheatland, Wyoming, having an on-line capacity of 1500 megawatts. The Laramie River Station has been proposed and is being developed by the other Amici who join in this Brief, excluding Cajun.

Western Fuels has the further responsibility of providing coal to Cajun to be used for purposes of generation of electric power by Cajun for distribution in its service area which includes primarily rural customers in Louisiana.

Basin is a regional wholesale power generation and transmission cooperative headquartered in Bismarck,

¹ The following references identify the respective amici curiae; Western Fuels Association, Inc.—“Western Fuels”; Basin Electric Power Cooperative, Inc.—“Basin”; Heartland Consumers Power District—“Heartland”; Lincoln Electric System—“Lincoln”; Missouri Basin Municipal Power Agency—“MBMPA”; Tri-State Generation and Transmission Association—“Tri-State”; Wyoming Municipal Power Agency—“WMPA”; Cajun Electric Power Cooperative, Inc.—“Cajun”.

North Dakota. Basin was organized by member cooperatives to provide its constituent members with self-generated, low cost thermal power and to integrate that power with hydroelectric power being supplied by the Bureau of Reclamation, an agency of the United States Department of the Interior whose functions include the marketing of hydroelectric power and energy produced at projects constructed and operated by the Bureau itself or by the Corps of Engineers, United States Army. These projects include the federal government's extensive complex of irrigation, flood control and navigation projects in the Missouri River Basin, as well as other such projects in the western United States.

Basin's membership and service area includes eight states—North and South Dakota, Montana, Colorado, Wyoming, Nebraska, Iowa and Minnesota. Its service area extends from the Canadian border in North Dakota and Montana through east central Colorado and western Nebraska, and from southwest Minnesota and northwest Iowa to western Montana and the north and east portions of Wyoming. Basin, through its member cooperatives, provides power for more than 100 rural electric cooperatives which in turn distribute the power to the end-use consumers which include more than 300,000 rural families, businesses and industries. Basin's end-use consumers comprise a group of more than one million people, the majority of whom are rural families.

Basin's goals since its inception have been to provide the rural communities in its service area with a reliable power source at low cost, thus satisfying the area's present power requirements and allowing for

rational economic expansion by increasing the availability of power.

Basin is a participant in the Laramie River Station.

Heartland is both a public corporation and a political subdivision of the State of South Dakota which was formed in 1969 pursuant to a voters' referendum. Heartland is a non-profit public utility district whose purpose is to supply electric energy and encourage and extend electric use throughout South Dakota which will foster economic growth in that area.

Heartland's service area consists of 36 counties in eastern South Dakota. Heartland's activities are confined to rural areas only and its specific function is to engage in wholesale bulk power supply and activities incidental thereto.

Heartland is required to sell electric energy at wholesale directly to any municipality, political subdivision, rural electric association, electric distribution cooperative, or any person, firm, association, or corporation which in turn generates, transmits, or distributes electricity on a non-profit basis in South Dakota. When any such entity makes application for the purpose of securing electric energy, Heartland must supply that power if it has the requested amount of electric energy available for sale.

Heartland is a participant in the Laramie River Station.

Lincoln is a municipally operated electric utility owned by the City of Lincoln, Nebraska. The territory served by Lincoln encompasses all areas within the city limits of Lincoln and the area which surrounds

those limits by approximately three miles. Lincoln has the right to serve all territories which may become annexed by the City in the future. Further, Lincoln owns and operates facilities serving certain nearby villages and covers approximately 190 square miles in Lancaster County, Nebraska, with a population of 175,000.

Lincoln both generates electric power to fulfill a portion of its needs and purchases power from the Nebraska Public Power District. Lincoln's energy requirements have nearly doubled since 1967 and they are expected to continue in this trend for the next ten years. The City of Lincoln, being the seat of the state and county governments, is a growing community with a diversified economy which links the large agricultural area nearby with that of commerce, industry and government. Lincoln also is a trade and commercial center; its heavy and light industry, food processing and meat packing concerns complement the agricultural resources of Nebraska's farm and ranch community. Further, Lincoln is an educational center which is the site of the University of Nebraska at Lincoln, having a student enrollment of more than 20,000, and is the site of Nebraska Wesleyan University, Union College and several vocational schools.

Lincoln is a participant in the Laramie River Station.

MBMPA is a non-profit organization comprised of municipal electric utilities in the states of Iowa, Minnesota and South Dakota, which functions in the form of a semi-governmental body pursuant to local statutory provisions. MBMPA's membership presently includes 61 municipal electric utilities which serve a population base of approximately 222,000 persons in Iowa,

Minnesota and South Dakota. MBMPA expects participation in the future by other municipalities.

MBMPA serves as a planning center and acts as a bargaining agent to supplement the power supply efforts of the individual member municipalities. This function offers the member utilities alternate planning schemes that incorporate the economies of scale ordinarily not available to individual municipal utilities when acting independently.

MBMPA is a participant in the Laramie River Station.

Tri-State is a non-profit corporation created in 1952 for the purpose of providing its members with a firm, long range supply of wholesale electric power. Tri-State presently acts as a wholesale power supplier for twenty-five distributing consumer owned utilities located in Colorado, Nebraska and Wyoming. Tri-State's service area covers 125,000 square miles in the western part of Nebraska, northwestern Colorado and a major part of Wyoming. Through its twenty-five distribution members, Tri-State serves more than 95,000 consumers.

While some of Tri-State's end-use consumers are industrial and commercial, the majority are rural residential consumers. Tri-State has in the past provided transmission services so that its members could more readily receive power from the Bureau of Reclamation. It has represented its members' interests in various coordinated power supply efforts and has contracted to become a partner in an electric generating project in Colorado.

Tri-State is a participant in the Laramie River Station.

WMPA is a non-profit organization comprised of nine municipal electric utilities located in Wyoming. WMPA was established to provide a supplemental source of power to its members after the year 1976, since the municipal utilities' present supplier, the Bureau of Reclamation, has given notice that it could not provide additional power for increasing needs of the municipalities after 1976. WMPA's function is to furnish power to its members in the most economical manner. To execute its duties, WMPA has the power to construct transmission, generation and related facilities, and it may furnish the power to its members either by generation and transmission or by purchase. WMPA has no generating capacity.

WMPA is a participant in the Laramie River Station.

With the exception of Western Fuels, each of the aforementioned entities is a preference customer of the Bureau of Reclamation and purchases a substantial portion of its power and energy requirements from the Bureau.²

Basin, Heartland, Lincoln, MBMPA, Tri-State and WMPA, a map of whose service areas is included as Appendix A, have undertaken to construct the Laramie River Station, a large, thermal-electric generating

² Section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h(c)) and Section 5 of the Flood Control Act of 1944 (16 U.S.C. § 825s) require that preference in the sale of hydroelectric power from the Bureau of Reclamation and Corps of Engineers projects, respectively, be given to municipalities and other public agencies and to cooperatives. The Secretary of the Interior, through the Bureau of Reclamation, markets power from the Corps of Engineers Pick-Sloan Missouri River Basin Project hydroelectric plants as well as from the Bureau's own plants. See note 3, *infra* at 10.

plant to be located in Platte County in southeastern Wyoming. The approximate site of the Laramie River Station is indicated on the map at Appendix A.

The proposed Laramie River Station will be a coal-fired steam-electric generating plant consisting of three units, each having a capability of 500 megawatts. A site of some 2400 acres will be utilized by the Station on which will be located the power plant itself, substation facilities, coal loading and storage facilities, a unit-train railroad loop, cooling towers and ash handlers and disposal facilities. The Laramie River Station project also includes a dam and reservoir of about 100,000 acre-feet capacity on the Laramie River. The Laramie River Station, including the dam and reservoir and backbone transmission lines, has an estimated construction cost of \$1,360,000,000.

The current production schedule provides that the first 500 megawatt unit will be placed in service in January of 1980, the second unit will come in service in the summer of 1980, and the final unit will become commercial in the summer of 1983. Once the units come on line, the above-noted six entities will utilize the power according to a Participation Agreement, whereby Basin holds a 42.27% share of the facility, Tri-State holds a 24.13% share, Lincoln holds a 13.33% share, MBMPA holds a 16.47% share, Heartland holds a 2.80% share and WMPA holds a 1.00% share. The six participants will hold the station as tenants-in-common.

By agreement, Basin has the responsibility for the design and construction of the plant and will act as operating agent for the project generation and transmission facilities. Basin's active role in these aspects

of the Laramie River Station is valuable in that Basin has constructed coal-fired plants in the past and has distinguished itself in construction activities by its efforts to protect the environment from unnecessary disruption during construction and operation of the plant. Basin undertook extensive environmental safeguards prior to any state or federal regulations pertaining to air and water quality and strip-mine land reclamation. Several examples will illustrate Basin's concern.

As early as 1962, Basin required in its fuel contracts that the coal supplier restore the topography of the strip mined area to rolling countryside after mining operations had ceased. This contractual provision was not required by state or federal law.

In early operation of Basin's Leland Olds power plant, North Dakota law would have allowed Basin to dump its fly ash (60,000 tons annually) into the Missouri River. Basin collected and impounded the ash and returned clean, effluent water to the river.

In 1967, Basin advocated, supported and testified on behalf of state air pollution control legislation. North Dakota passed such legislation in 1969. Basin has taken similar efforts in support of water quality legislation and spoil bank legislation.

Basin's experience in and concern for environmental protection will be evidenced in the techniques and method of construction and operation of the Laramie River Station.

The genesis of the Laramie River Station extends back to the latter part of the 1950's. As indicated above, residents of the Northern Great Plains had depended

upon the Bureau of Reclamation for their power needs. However, the Secretary of the Interior in 1959 and again in 1961, notified the power consumers in that area that the Pick-Sloan Missouri River Basin Project³ which supplies the rural electric cooperatives and other preference customers with hydroelectric power and energy, would not be able to meet their additional requirements beyond the winter of 1965. These consumer owned utilities were confronted with three basic choices: to purchase power from investor owned utilities at higher cost; to construct small thermal generating plants throughout the area with high fuel, capital and operating costs; or to join together, pool their needs and resources and construct large generating units which would meet their power needs. The latter option was utilized.

Joint planning efforts were undertaken by the consumer owned utilities in the upper Missouri River Basin, covering all or parts of Montana, Wyoming, Colorado, North and South Dakota, Nebraska, Minnesota and Iowa. The objective of the joint planning is the installation of generating and transmission facilities on a schedule meeting power needs in a fashion calculated to achieve for the participants the economies of scale inherent in the construction of large base-load generating units, the advantages of integrating fossil-fueled generating units with the hydro-generating de-

³ Authorized by Section 9 of the Flood Control Act of 1944 (58 Stat. 891), the project is a coordinated plan developed by the Corps of Engineers and the Bureau of Reclamation for the control and development of the waters of the Missouri River and its tributaries for the multiple purposes of flood control, navigation, irrigation, municipal and miscellaneous water supply, hydroelectric power, recreation and fish and wildlife conservation and enhancement.

velopments undertaken by the federal government as a part of the Pick-Sloan Missouri River Basin Project, and the advantages of pooling together transmission facilities with costs shared on a proportionate use basis. This joint planning has resulted in power plants such as the Leland Olds Plant in Stanton, North Dakota and the William J. Neal Station in Velva, North Dakota.

Despite these actions, the power requirements of the consumers served by the six participants in the Laramie River Station are such that demand will exceed supply, with an ever-widening gap between need and supply, if the in-service schedules, whereby two 500 megawatt units will be on line by June 1, 1980, with the third on line by June 1, 1983, are not met in a timely fashion.⁴

An extensive siting and economic study was performed in early 1973 for the participants in the Laramie River Station, which considered more than seventy possible combinations of site location, generating type and size, fuel source, water supply, cooling method, and transmission delivery systems. This study indicated that the site area promising the lowest cost for long range base-load power supply throughout this area and appearing to have no unusual environmental impact, was at mine-mouth, or near mine-mouth locations in eastern Wyoming. Ultimately, the most advantageous site for the Laramie River Station was de-

⁴ For a detailed discussion and analysis of the participants' load growth and power supply needs, see "Preliminary Report on the Feasibility Study for the Laramie River Station," July 1, 1975. Burns and McDonnell Consulting Engineers. Copies will be made available to all parties and to the Court upon request.

terminated to be in Platte County, in southeastern Wyoming. *See* Appendix A.

An important factor in the selection of the site for the Laramie River Station is its proximity to the Eastern Powder River Coal Basin of Wyoming which, as the Federal Petitioners point out, contains more than one quarter of the nation's strippable coal reserves.⁵

Western Fuels is responsible for securing the coal supplies for the Laramie River Station. It has arranged for three separate sources of coal from the Eastern Powder River Coal Basin.

Western Fuels has acquired applications pending before the Department of the Interior for the issuance of preference right coal leases under Section 2 of the Federal Mineral Leasing Act of 1920, 30 U.S.C. § 201, covering Eastern Powder River Coal Basin coal, which it estimates will produce at least 60 million tons of coal by surface mining.

Western Fuels has entered into contractual arrangements with El Paso Energy Resources Company, which itself has acquired certain preference right lease applications for coal in the Eastern Powder River Coal Basin pending before the Department of the Interior, under which coal will be supplied from that source. Analyses within the Department of the Interior of the applications for preference right leases held by Western Fuels and El Paso are in progress.

Western Fuels has contracted with Sunoco Energy Development Co. for the purchase of 60 million tons of coal from the Cordero Mine in the Eastern Powder

⁵ Petition for Writ of Certiorari, *Frizzell, et al. v. Sierra Club, et al.*, No. 75-552, at 8.

River Coal Basin on a delivery schedule consistent with start-up needs at the Laramie River Station. Sun holds the Cordero Mine under a lease from the Secretary of the Interior issued in 1971 pursuant to the coal leasing provisions of the Federal Mineral Leasing Act. 30 U.S.C. §§ 201-209.

Sun's application for approval of the mining plan for the Cordero Mine is presently before the Secretary of the Interior. A draft site-specific environmental impact statement covering the mining plan has been published by the Department of the Interior and has been released for public comment.

If the decision below is ultimately upheld, the impact upon the Laramie River Station, the six participants therein and their consumers, would be devastating. The court below clearly considers the Eastern Powder River Coal Basin to be encompassed within the larger so-called "Northern Great Plains Region" which is the subject of its decision. As a practical matter, the injunction entered by the court below (which was stayed pending a decision on the merits by this Court's order of January 12, 1976) threatens again to halt development of federal coal and all further coal related activities, if it should again become effective.⁶

⁶ While the injunction's terms prevented the Secretary of the Interior from taking action only concerning the four mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement, the court below made no secret of the fact that the limited reach of the injunction was based, in large part, on a continuation of the "forbearance" of the federal appellees in authorizing activities "in the Region" pending issuance of the then-unissued Northern Great Plains Resources Program Report. Even more pointedly, the court below "urged" appellees to take no action that "would defeat the purpose" designed to be served by a comprehensive regional

If this Court determines that the preparation of such an environmental impact statement is necessary, or if this Court decides, as did the court below, that the parties here must return to the District Court for further proceedings there, great and costly delays will result. The preparation of an environmental impact statement for an area as large as the "Northern Great Plains Region" no doubt would take years to accomplish. Further, the promulgation of that impact statement could and probably would engender further litigation concerning its sufficiency.

As stated above, the Laramie River Station, through Western Fuels, has contracted for and established sources of coal which are located in the "Northern Great Plains Region." A decision by this Court requiring the preparation of an EIS prior to mining

impact statement for the Northern Great Plains, while deciding whether to prepare such a comprehensive EIS. Apparently in order to make sure that the federal appellees "got the message" the court below noted that "the courts remain open, to appellants and others," should the federal appellees decide nonetheless to approve any private endeavors in the Northern Great Plains. Finally, in what surely must rank as a supreme "gilding of the lily," the court followed up with the statement that it did not need to reach the issue of whether an injunction against activity, either ongoing or proposed, in the Northern Great Plains should issue pending preparation of a "comprehensive regional impact statement," noting that "a responsible policy of restraint by the federal appellees with respect to authorizing such activity might make the question moot." Pet. 75-552, App. A, 51A-52A.

The chilling effect of such admonitions is obvious, not only upon federal officials but also upon non-federal interests contemplating coal and coal related activities, during the entire period pending completion of a regionwide EIS contemplated by the court below, and litigation over its adequacy or, in the alternative, pending litigation over decisions by the federal officials involved not to undertake preparation of such an EIS. *Id.*, App. A, 49A-52A.

this region, or a decision which would result in lengthy remand proceedings, could eradicate the Station's sources of coal. In the absence of a reliable source of coal from the Eastern Powder River Basin, the timing of the completion and operation of the Laramie River Station will be delayed, and the entire project may be placed in jeopardy. Failure of the Laramie River Station to come on-line according to the schedule described above will cause irreparable harm to the consumers of electric energy in the participants' service areas and to the general economy of those areas as well.

Cajun is a non-profit electric power system serving rural customers in Louisiana. Cajun is a wholesale power supplier for twelve of the thirteen rural electric cooperatives now existing in Louisiana. Cajun's members' service areas encompass approximately 80% of the surface area of the State, and have a population of approximately 750,000.

Cajun presently generates 35% of its requirements from an existing thermal generating plant, Big Cajun No. 1, and purchases the remainder of its requirements from investor owned utilities in Louisiana. Based on representation of its suppliers that Cajun will no longer be able to rely on them to meet its power and energy needs, Cajun is in the process of developing two additional 540 megawatt coal-fired generating units to be known as Big Cajun No. 2. The first of these units is scheduled to go on line in the last quarter of 1979; the second in the third quarter of 1980. Both are needed if Cajun is to meet increasing requirements for reliable and economical power and energy for Louisiana's rural people, agriculture and industry in the 1980's. When fully operational, Big Cajun No.

2 will require approximately four million tons of coal per year.

To assure an adequate source of coal, Cajun has executed a contract with Shell Oil Company for coal to be mined from the Youngs Creek Mine in Big Horn County, Montana, on the Crow Indian Reservation, a part of the "Northern Great Plains Region" as conceived by the court below. In addition, Cajun has executed a contract with Pullman Standard, division of Pullman, Inc., for 848 open top gondola cars to ship by rail Youngs Creek coal from Montana to St. Louis, Missouri. From St. Louis, American Commercial Barge Line Co. has contracted to barge the coal on the Mississippi River to the Big Cajun No. 2 plant site.

Shell Oil Company's right to Youngs Creek coal is derived by virtue of a lease issued Shell by the Crow Tribe. Pursuant to 25 U.S.C. § 391, *et seq.*, the Secretary of the Interior has the jurisdiction to approve mineral leases of Indian lands by various Indian tribes, including the Crow Tribe.⁷ As a corollary to this jurisdiction, the Secretary has, by regulation, exerted jurisdiction over the actual extraction of minerals by virtue of requiring Department approval of mining plans developed by the leaseholder. 25 C.F.R. § 177.7.

Shell has requested Interior Department approval for its coal development and, thus, the decision of the court below if sustained and if the injunction is rein-

⁷ The lease was approved by the United States Department of the Interior on June 8, 1972. The validity of the Shell lease, along with other Crow Tribal leases, is presently being challenged. *Crow Tribe of Indians v. Kleppe, et al.*, No. CV-76-10 BLG (D. Mont., filed February 3, 1976).

stated, effectively enjoins the federal defendants from going forward on approval of the Youngs Creek Mine.^{*} As a result, in a fashion similar to the consequences of the delays in federal approvals needed for the coal supply for the Laramie River Station, the timely delivery of coal for Big Cajun No. 2 is endangered, thereby jeopardizing the power supply for Cajun's rural customers.

SUMMARY OF ARGUMENT

In addition to joining in the arguments of the Petitioners in 75-552 and 75-561, these Amici assert that, following notice from the Secretary of the Interior

^{*} In *Cady v. Morton*, No. 74-1984 (9th Cir., June 19, 1975) the Ninth Circuit held that Secretarial approval of coal leases of substantial acreage of Crow Indian owned coal constituted a major federal action requiring the preparation of an EIS under NEPA and that NEPA's requirement could not be satisfied simply by EIS's prepared for individual mining plans covering portions of the leaseholds.

The Ninth Circuit in *Cady* did not go beyond holding that an EIS must be prepared for the project contemplated by the Crow leases therein considered as well as for the individual mining plans. It did not hold that a "regional" EIS of the nature contemplated by the court below in the decision under review was required. Indeed, the Ninth Circuit made clear, by citing with approval its earlier holding in *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir. 1975), that it continues to adhere to the "irretrievable commitment of resources" test in determining the adequacy of an EIS. See *Cady v. Morton, supra*, slip at — (8 ERC at 1102 n.9).

Stated briefly, the "irretrievable commitment of resources test" provides that an EIS is sufficient if it discusses all of the activity to which resources are irretrievably committed by the project for which the statement has been prepared. See e.g., *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975); *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975); *Friends of the Earth, Inc. v. Coleman, supra*.

that the federally generated hydroelectric power would be insufficient to meet load growth and that therefore the people of the Northern Great Plains area must make their own arrangements for non-federal power to meet their requirements, these Amici initiated, developed and, in part, consummated plans to obtain for themselves a firm bulk power supply through their own coal-fired, steam generating plants. The difficulties experienced by these Amici in developing bulk power generation and in obtaining the required coal resources related thereto on an independent basis and without affirmative federal assistance, demonstrates that no federal program or proposal exists for the development of coal resources in the "Northern Great Plains Region."

ARGUMENT

These Amici Curiae join in the arguments of the Federal Petitioners in 75-552 and of the American Electric Power System, *et al.*, in 75-561, that the National Environmental Policy Act' (hereinafter NEPA) does not require the preparation of an environmental impact statement for the so-called "Northern Great Plains Region."

Briefly stated, those arguments are: that both the plain words of NEPA and the legislative history thereof, require the preparation of environmental impact statements only where a recommendation or report upon a proposal for federal action is made and that no such recommendation or report has been made with respect to the "Northern Great Plains Region"; that the decision below is in conflict with this Court's de-

* 42 U.S.C. §§ 4321, 4331-4335, 4341-4347.

cision in *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289 (1975); and that mere contemplation of federal action does not require the preparation of an environmental impact statement. In addition, these Amici argue, on the basis of their own experience, that no federal plan exists for development of or control of development of the coal resources of the so-called "Northern Great Plains Region," separate and apart from application of the coal leasing provisions of the Mineral Leasing Act¹⁰ and other federal permit authority over federal or federally controlled coal lands wherever situated in the United States.

THE SPECIFIC EXPERIENCES OF THE AMICI HERE DEMONSTRATE THAT THERE IS NO FEDERAL PROPOSAL FOR THE DEVELOPMENT OF COAL IN THE SO-CALLED "NORTHERN GREAT PLAINS REGION"

The requirement for an environmental impact statement arises where there is a recommendation or report on a "proposal" for a major federal action. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

The District Court found (Pet. 75-552, App. D, F. 29, 95A) that "There is no existing or planned Federal Program or action in the area defined by the plaintiffs as the 'Northern Great Plains region' . . . as to which the Federal Government has made commitments to take further steps to carry out proposals." The District Court further found (*id.*, F. 29, 96A) that, "There is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by the plaintiffs as the 'Northern Great Plains region' are being planned or constructed as part of any inte-

¹⁰ 30 U.S.C. §§ 201-209.

grated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in this area."

The experience of these Amici amply demonstrates the correctness of those findings.

As indicated above, these Amici developed, fostered and implemented their own plans for developing a bulk power supply on an independent basis, without receiving specific affirmative aid from, or taking part in, an established federal program.

In 1959 and again in 1961, the Secretary of the Interior notified the preference customers purchasing hydroelectric power from the Pick-Sloan Missouri River Basin Project that federally generated power would not be sufficient to fill the needs of the consumers in the upper Missouri River basin. They were told to initiate their own efforts aimed at securing a firm source of electric power to meet their growing needs and to allow for reasoned economic growth in the area. The Amici here, on an individual basis or in cooperation with each other, did exactly that.

Moreover, as the District Court found (*id.*, App. D, F. 12-13, 89A-90A), and as the court below conceded, (*id.*, App. A, 5A, 34A) an attempt by the Secretary of the Interior to coordinate energy development throughout the North Central States (an area not entirely synonymous with the so-called "Northern Great Plains") was abandoned as a failure.

In the absence of a federal plan for development of a bulk power supply for their service areas, the Amici proposed, planned, developed, financed, con-

structed and operated their own sources of electric generation.

These Amici (other than Cajun) now seek to add a new source of electric generation—the Laramie River Station. In the development of the Station, no federal plan for development of bulk power supply was utilized, nor was one available. The sole activity of the federal government is fulfilling the passive role of issuing approvals, permits and loaning funds.

The same is true of Cajun in respect to Big Cajun Nos. 1 and 2.

As particularly related to coal development, the Amici, primarily through Western Fuels, took affirmative action on their own to locate and secure reliable coal sources. The only action to be taken by the federal government is the consideration of specific lease applications and mining plans which were initiated through the efforts of these Amici and their private suppliers.

The difficulties encountered by these Amici and the affirmative, independent steps which they took to secure coal sources, belies the assertion of the Respondents here that a federal proposal or program exists for the development of coal in the "Northern Great Plains Region," as distinguished from the federal government's administration of the Mineral Leasing Act and other permit authority in relation to federally controlled coal lands, wherever located, throughout the United States.

CONCLUSION

For the foregoing reasons, we join Petitioners in urging that the judgment of the court below should be reversed and the case remanded with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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Dated: February 26, 1976

Certificate of Service

I, Edward Weinberg, hereby certify that on February 26, 1976 the Brief for Amici Curiae in the above captioned proceeding was served upon all counsel, pursuant to Rule 33 of the Supreme Court Rules, by mailing copies by first class mail, postage prepaid, as follows:

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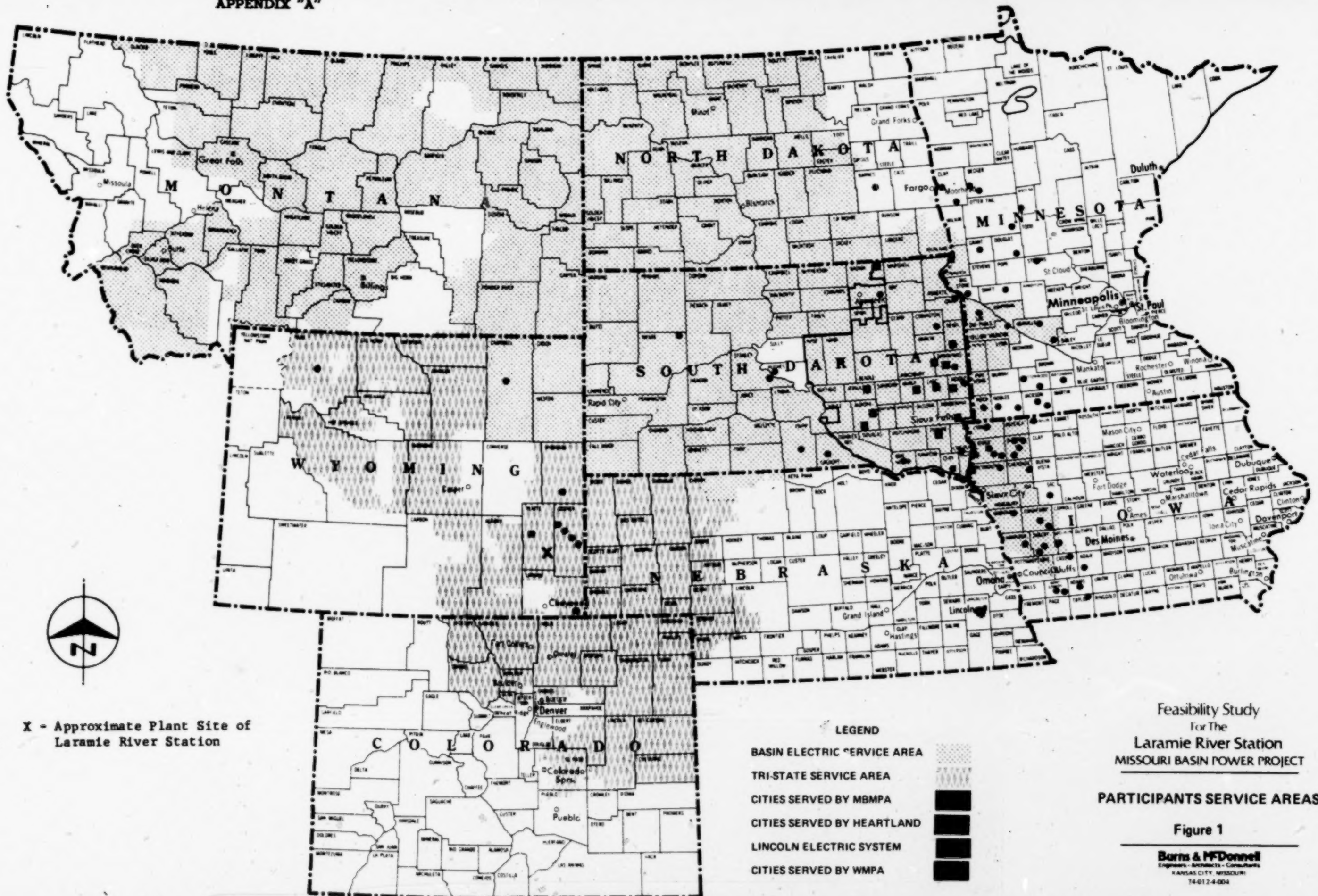
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APPENDIX

APPENDIX "A"



X - Approximate Plant Site of
Laramie River Station